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Dispute Settlement Body
30 September 2019

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 30 SEPTEMBER 2019

Chairman: H.E. Dr David Walker (New Zealand)

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1.1. The Chairman noted that there were six sub-items under this Agenda item concerning status reports submitted by delegations pursuant to Article 21.6 of the DSU. He recalled that Article 21.6 required that: "[u]nless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue is resolved". Under this Agenda item, he invited delegations to provide up-to-date information about their compliance efforts. He also reminded delegations that, as provided for in Rule 27 of the Rules of Procedure for DSB meetings: "[r]epresentatives should make every effort to avoid the repetition of a full debate at each meeting on any issue that has already been fully debated in the past and on which there appears to have been no change in Members' positions already on record". He then turned to the first status report under this Agenda item.

A. United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.199)

1.2. The Chairman drew attention to document WT/DS184/15/Add.199, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the dispute concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

1.3. The representative of the United States said that the United States had provided a status report in this dispute on 19 September 2019, in accordance with Article 21.6 of the DSU. The United States had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue. With respect to the DSB's recommendations and rulings that had yet to be addressed, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

1.4. The representative of Japan said that his country thanked the United States for its most recent status report and its statement made at the present meeting. Japan, once again, called on the United States to fully implement the DSB's recommendations and rulings so as to resolve this matter.

1.5. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

B. United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.174)

1.6. The Chairman drew attention to document WT/DS160/24/Add.174, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the dispute concerning Section 110(5) of the US Copyright Act.

1.7. The representative of the United States said that the United States had provided a status report in this dispute on 19 September 2019, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the European Union, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

1.8. The representative of the European Union said that his delegation wished to thank the United States for its status report and its statement made at the present meeting. He referred to the EU's statements made at previous DSB meetings on this matter. The European Union wished to resolve this dispute as soon as possible.

1.9. The representative of China said that, nearly two decades after the DSB had adopted the Panel Report in this dispute, the United States continued to fail to bring its WTO-inconsistent measures into conformity. None of its 175 status reports provided thus far indicated any progress on implementation, which was incompatible with Article 21.1 of the DSU. Prompt compliance was a legal obligation under the DSU that had to be met unconditionally. Compliance had an impact on Members' trust with respect to the effectiveness of the dispute settlement system and its ability to rectify WTO-inconsistent trade distortions. When the United States, the most frequent user and the major beneficiary of the dispute settlement system, deliberately neglected this legal obligation for so long, the security and predictability of the multilateral trading system would inevitably be compromised. Therefore, ensuring prompt compliance should necessarily be one of the priorities in any WTO dispute settlement reform. China, therefore, urged the United States to faithfully honour its commitments under the DSU and the TRIPS Agreement by implementing the DSB's recommendations and rulings in this dispute without further delay.

1.10. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

C. European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.137)

1.11. The Chairman drew attention to document WT/DS291/37/Add.137, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the dispute concerning measures affecting the approval and marketing of biotech products.

1.12. The representative of the European Union said that the European Union continued to progress with the authorizations where the European Food Safety Authority had finalized its scientific opinion and concluded that there were no safety concerns. As repeatedly explained by the EU and confirmed by the United States during the EU-US biannual consultations held on 12 June 2019, efforts to reduce delays in authorization procedures were constantly maintained at a high level. This had resulted in a clear improvement of the situation. It was also important to note that the slow reaction of applicants in certain applications also increased the overall average time needed for risk assessment. On 16 September 2019, two draft authorizations[1] for new GM maize had been presented for a vote in the Appeal Committee with a "no opinion" result. Thereafter, it was for the European Commission to decide on these authorizations. Furthermore, on the same day, a draft authorization for a new GM maize[2] had been presented for a vote in a member States Committee with a "no opinion" result. This measure would, thereafter, be submitted for a vote in the Appeal Committee on 11 October 2019. At past DSB meetings, the United States had referred to what was known as the EU "opt-out Directive". The EU wished to reiterate that the DSB's recommendations and rulings did not cover that "opt-out Directive". At past DSB meetings, the United States had also made certain references to a statement by the EU Group of Chief Scientific Advisors. The EU wished to clarify that this statement focused on the future challenges for products obtained by new mutagenesis techniques. The statement did not state nor imply that Directive 2001/18 would not be "fit for purpose" as regarded "conventional GMOs". The EU acted in line with its WTO obligations. Finally, the EU wished to recall that the EU approval system was not covered by the DSB's recommendations and rulings in this dispute.

1.13. The representative of the United States thanked the European Union (EU) for its status report and its statement made at the present meeting. While the United States appreciated the European Commission's approval of several soy and corn products in July 2019, the United States remained concerned with the EU's approval of biotech products. The United States continued to see delays that affected dozens of applications that had been awaiting approval for an extended period, or that had already received approval. And even when the EU finally approved a biotech product, EU member States continued to impose restrictions on the supposedly approved product. As the United States had noted at prior DSB meetings, the amendment of EU Directive 2001/18, through EU Directive 2015/413, permitted EU member States to, in effect, restrict or prohibit cultivation of genetically-modified organisms (GMOs), even where the European Food Safety Authority (EFSA) had concluded that the product was safe. This legislation permitted EU member States to restrict for non-scientific reasons certain uses of EU-authorized biotech products in their territories by demanding that EU cultivation authorizations be adjusted to exclude portions of an EU member State's territory from cultivation. At least seventeen EU member States, as well as certain regions within EU member States, had submitted such requests with respect to MON-810 maize. The United States, once again, emphasized the public statement issued by the EU's Group of Chief Scientific Advisors on 13 November 2018, in response to the 25 July 2018 European Court of Justice (ECJ) ruling that addressed the forms of mutagenesis that qualified for the exemption contained in EU Directive 2001/18/EC. The Directive had been a central issue in dispute in these WTO proceedings, and concerned the deliberate release into the environment of genetically modified organisms, or GMOs. Contrary to the EU's statement made at prior DSB meetings, this ECJ ruling related to previously authorized GMOs. The EU Group of Chief Scientific Advisors' statement spoke to the lack of scientific support for the regulatory framework under EU Directive 2001/18. The message provided in that statement was clear: "in view of the Court's ruling, it becomes evident that new scientific knowledge and recent technical developments have made the GMO Directive no longer fit for purpose". The statement further advised that current scientific knowledge called into question the definition of "GMOs" under the Directive and noted that mutagenesis, as well as transgenesis, occurred naturally. The EU should take this guidance into account in its reconsideration of the GMO Directive, in light of the evident advancements in scientific knowledge and technology.

[1] Maize MON-89034 × 1507 × MON-88017 × 59122 × DAS-40278-9 and maize MON-89034 × 1507 × NK603 × DAS-40278-9

[2] Maize Bt11 × MIR162 × MIR604 × 1507 × 5307 × GA21

The United States urged the EU to ensure that all of its measures affecting the approval of biotech products, including measures adopted by individual EU member States, were based on scientific principles, and that decisions were taken without undue delay.

1.14. The representative of the European Union said that the WTO Agreements did not require full international harmonization and left some regulatory space or autonomy to individual WTO Members. The European Union had different regulatory approaches for non-GMOs and GMOs but, in all cases, such regulations did not discriminate between imported and domestic like products. No EU member State had imposed any "ban". Under the terms of the relevant Directive, mentioned by the United States, an EU member State could adopt measures restricting or prohibiting cultivation only when such measures were in line with EU law and were reasoned, proportional, non-discriminatory and based on compelling grounds. The free movement of seeds was embedded in Article 22 of Directive 2001/18/EC: "[m]ember States may not prohibit, restrict or impede the placing on the market of GMOs, as products or in products, which comply with the requirements of this Directive". The EU also noted that according to the provisions of the opt-out Directive (Article 26b, point 8) the measures adopted under the Directive "shall not affect the free circulation of authorised GMOs" in the EU. Currently, the EU Common Catalogue of varieties of agricultural species included 150 varieties of maize MON-810, which were allowed to be marketed in the EU. As of now, the European Commission had never received any complaint from seed operators or other stakeholders concerning the restriction or marketing of MON-810 seeds in the EU. This confirmed the smooth functioning of the internal market of MON-810 seeds. The EU invited the United States to provide any evidence they might have at their disposal that would substantiate the disruption of the free movement of MON-810 seeds in the EU. In relation to the statement of the Group of Chief Scientific Advisors, the EU wished to recall that the Group of Chief Scientific Advisors was an independent group of scientific experts providing scientific advice to the European Commission. There had been many reactions to the judgement of the Court of Justice of the European Union, bringing forward a wide range of different views. The statement to which the United States had referred fed into ongoing discussions on new mutagenesis techniques with all stakeholders. Some stakeholders agreed with that statement. However, many others considered that the current legislation was adequate to address the risks from new biotechnology developments. The European Commission had a strong interest in this debate, which should go beyond the regulatory status of new technologies and focus on the way new products could help address societal challenges, such as climate change or reduction of use of pesticides, without negative consequences for health and environment protection.

1.15. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

D. United States – Anti-dumping and countervailing measures on large residential washers from Korea: Status report by the United States (WT/DS464/17/Add.21)

1.16. The Chairman drew attention to document WT/DS464/17/Add.21, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the dispute concerning anti-dumping and countervailing measures on large residential washers from Korea.

1.17. The representative of the United States said that the United States had provided a status report in this dispute on 19 September 2019, in accordance with Article 21.6 of the DSU. On 6 May 2019, the US Department of Commerce had published a notice in the US Federal Register announcing the revocation of the anti-dumping and countervailing duty orders on imports of large residential washers from Korea (84 Fed. Reg. 19,763 (6 May 2019)). With this action, the United States had completed implementation of the DSB's recommendations concerning those anti-dumping and countervailing duty orders. The United States continued to consult with interested parties on options to address the DSB's recommendations relating to other measures challenged in this dispute.

1.18. The representative of Korea said that his country wished to thank the United States for its status report. Korea again urged the United States to take prompt and appropriate steps to implement the DSB's recommendations with regard to the "as such" measure in this dispute.

1.19. The representative of Canada said that the United States continued to fail to comply with the DSB's ruling, arising out of the Appellate Body report in this dispute, that the "differential pricing methodology" was "as such" WTO-inconsistent. The United States had also ignored the DSB's recommendation that the United States bring itself into compliance with its obligations. Instead, the United States continued to apply the "as such" inconsistent differential pricing methodology in investigations with respect to foreign companies and continued to collect cash deposits from foreign exporters based on its inconsistent methodology. As a result, Canada had been forced to challenge the differential pricing methodology measure in the "US – Differential Pricing Methodology" dispute (DS534) and Viet Nam was currently doing the same in the "US – Fish Fillets" dispute (DS536). Before these Panels, the United States had simply re-litigated the dispute concerning the WTO-consistency of the differential pricing methodology and had asked the Panels to ignore the Appellate Body's findings. Canada remained deeply concerned with the United States' continued failure to comply with the DSB's recommendations and rulings in this dispute. This failure seriously undermined the security and stability of the multilateral trading system.

1.20. The representative of China said that the Panel and the Appellate Body Reports in this dispute had made a number of important clarifications on the interpretation of the Anti-Dumping Agreement. Among other things, the use by the United States of a differential pricing methodology and zeroing when applying the W-T methodology had been found to be "as such" WTO-inconsistent. As a third party to the original proceeding in this dispute, China noted that the United States continued to fail to bring its inconsistent measures into conformity. The reluctance of the United States regarding compliance, especially in anti-dumping disputes such as the one at issue, left WTO Members such as China, Canada, Korea and Viet Nam no choice but to repeatedly challenge the same inconsistent measures of the United States before panels and the Appellate Body. Article 21.1 of the DSU explicitly set out the compliance obligation, which should be unconditionally observed by all WTO Members. China, therefore, urged the United States to faithfully implement the DSB's recommendations and rulings in all cases including this one.

1.21. The representative of the United States recalled that, as Canada had noted, Canada had commenced a dispute settlement proceeding against the United States concerning the use of a differential pricing analysis and zeroing. Canada had lost that dispute before the Panel. The United States was willing, of course, to discuss Canada's concerns bilaterally.

1.22. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

E. United States – Certain methodologies and their application to anti-dumping proceedings involving China: Status report by the United States (WT/DS471/17/Add.13)

1.23. The Chairman drew attention to document WT/DS471/17/Add.13, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the dispute concerning certain methodologies and their application to anti-dumping proceedings involving China.

1.24. The representative of the United States said that the United States had provided a status report in this dispute on 19 September 2019, in accordance with Article 21.6 of the DSU. As explained in that report, the United States continued to consult with interested parties on options to address the DSB's recommendations.

1.25. The representative of China said that, on 22 May 2017, the DSB had adopted the Appellate Body Report and the modified Panel Report in this dispute, which had found that certain measures taken by the United States to be inconsistent with the requirements of the Anti-Dumping Agreement, including the following: (i) the use of zeroing under the W-T methodology was "as such" inconsistent with Article 2.4.2; (ii) the so-called "single rate presumption" "as such" violated Article 6.10 and 9.2, and (iii) the "adverse facts available" was a norm of general and prospective application which could be subject to future "as such" challenges. China was very disappointed that, more than two years after the DSB had adopted recommendations and rulings in this dispute, and 13 months after the expiry of the reasonable period of time for implementation, the United States continued to fail to bring its WTO-inconsistent measures into conformity. As China had noted at prior DSB meetings, status reports provided by the United States did not appear to be different from one another, and none indicated any progress on implementation. When China had sought the authorization to suspend in accordance with the DSU, the United States had chosen to further delay

the resolution of this dispute by referring the matter to Article 22.6 of the DSU on arbitration. China was deeply concerned that the WTO-inconsistent measures of the United States continued to infringe China's economic interests, distorted relevant international markets and undermined the effectiveness of the dispute settlement system. While China was still waiting for concrete implementation by the United States, it nevertheless stood ready to take appropriate action in accordance with WTO rules to safeguard its legitimate interests. Article 21.1 of the DSU provided that: "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". China urged the United States to take prompt action and fully implement the DSB's recommendations and rulings in this dispute without further delay.

1.26. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

F. Indonesia – Importation of horticultural products, animals and animal products: Status report by Indonesia (WT/DS477/21/Add.8 – WT/DS478/22/Add.8)

1.27. The Chairman drew attention to document WT/DS477/21/Add.8 – WT/DS478/22/Add.8, which contained the status report by Indonesia on progress in the implementation of the DSB's recommendations in the dispute concerning importation of horticultural products, animals and animal products.

1.28. The representative of Indonesia said that his country wished to inform Members that it had completed the enactment process of the new Minister of Agriculture Regulations which were relevant to these disputes, namely the Minister of Agriculture Regulation No. 39/2019 concerning Recommendations for Importation of Horticultural Products and the Minister of Agriculture Regulation No. 42/2019 concerning the Importation of Carcass, Meat, Edible Offal and/or Its Processed Products for Consumption into the Territory of the Republic of Indonesia. Regarding Measure 18, a Ministerial level meeting to discuss the draft amendment of the relevant laws along with its academic drafts had taken place. The drafts would be brought to, and discussed with, the President for further processing. Indonesia would continue to engage with New Zealand and the United States regarding matters related to the DSB's recommendations and rulings in this dispute.

1.29. The representative of New Zealand said that his country wished to thank Indonesia for its statement and the status report. New Zealand acknowledged the steps that had been taken by Indonesia to date to bring its regulations into compliance with the DSB's recommendations and rulings in this dispute, and Indonesia's commitment to comply fully with these recommendations and rulings. New Zealand noted that both of the compliance deadlines that had been agreed between the parties had since expired. New Zealand welcomed the progress that had been made toward the legislative process for the removal of Measure 18, which was recorded in Indonesia's most recent status report. New Zealand remained seriously disappointed that full compliance had still not been reached in respect of a number of measures addressed in the dispute. New Zealand was particularly concerned about: (i) the failure to remove Measure 18; (ii) the continued enforcement by Indonesia of limited application windows and validity periods; (iii) harvest period import bans; (iv) import realization requirements; and (v) restrictions placed on import volumes based on storage capacity. These issues, and others, continued to adversely impact New Zealand's exporters. The New Zealand Embassy in Jakarta was, therefore, following developments closely and would also appreciate direct updates on progress, including concrete timelines for further regulatory and legislative changes. New Zealand strongly encouraged Indonesia to take appropriate steps, swiftly, to achieve long-term, commercially meaningful, compliance with the DSB's recommendations and rulings in this dispute.

1.30. The representative of the United States said that Indonesia continued to fail to bring its measures into compliance with WTO rules. The United States and New Zealand agreed that significant concerns remained with the measures at issue, including the continued imposition of: harvest period restrictions, import realization requirements, warehouse capacity requirements, limited application windows, limited validity periods, and fixed licensed terms. The United States remained willing to work with Indonesia to fully and meaningfully resolve this dispute. The United States understood that Indonesia claimed to have "completed its enactment process" of certain regulations, but the United States was still waiting to hear from Indonesia on whether and how such action would bring its measures into full compliance. It also remained unclear how

Indonesia's proposed legislative amendments would address Measure 18 and when Indonesia would complete its process. The United States looked forward to receiving further detail from Indonesia regarding the planned changes to its regulations and laws.

1.31. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

2 UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. Statement by the European Union

2.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the European Union. He then invited the representative of the European Union to speak.

2.2. The representative of the European Union said that his delegation requested, once again, that the United States stopped transferring anti-dumping and countervailing duties to the US industry. Even if the amounts at issue had considerably decreased, the latest Continued Dumping and Subsidy Offset Act report from December 2018 showed that amounts were still being disbursed in practice. Every disbursement that took place was clearly an act of non-compliance with the DSB's recommendations and rulings in this dispute. As long as the United States did not fully stop transferring collected duties, this item was rightly under the DSB's surveillance. The EU would continue to insist in this respect – as a matter of principle – independent of the cost resulting from the application of such limited duties. The EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU to submit status reports on implementation in this dispute. The EU would continue to place this item on the Agenda of DSB meetings as long as the United States had not fully implemented the WTO ruling and until the disbursements had ceased completely. This was a matter of principle which justified the cost arising out of the application of WTO rules.

2.3. The representative of Brazil said that, as an original party to this dispute, his country wished to thank, once again, the European Union for placing this item on the DSB Agenda. After more than 16 years of the DSB's recommendations in this dispute, and more than 13 years after the date of the Deficit Reduction Act that had repealed the Byrd Amendment, anti-dumping and countervailing duties were still being disbursed to US domestic petitioners. Brazil called on the United States to comply fully with the DSB's recommendations and rulings in this dispute.

2.4. The representative of Canada said that his country wished to thank the European Union for placing this item on the DSB Agenda. Canada agreed with the European Union that the Byrd Amendment should remain subject to the surveillance of the DSB until the United States ceased to administer it.

2.5. The representative of the United States said that as the United States had noted at previous DSB meetings, the Deficit Reduction Act – which included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – had been enacted into law in February 2006. Accordingly, the United States had implemented the DSB's recommendations and rulings in these disputes. The United States recalled, furthermore, that the EU had acknowledged that the Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007, more than 11 years ago. Even aside from this, the United States questioned the trade rationale for inscribing this item on the Agenda of the DSB. In May 2019, the EU had notified the DSB that disbursements related to EU exports to the United States had totalled US$4,660.86 in fiscal year 2018. As such, the level of countermeasures under the Arbitrator's formula in relation to goods entered before 2007 was US$3,355.82. The EU had announced it would apply an additional duty of 0.001 percent – that is, one-one thousandth of a percent – on certain imports of the United States. If the calculation of the United States was correct, application to goods worth US$3,355.82 of an additional duty of 0.001 percent yields duties collected worth about US$3.35. The United States could round up that amount to US$3.36. These values were no doubt outweighed by the associated costs resulting from the application of these countermeasures – or the DSB's taking up this Agenda item. With respect to the EU's request for status reports in this matter, as the United States had already explained at previous DSB meetings, there was no obligation under the DSU to provide further status reports once a Member announced that it had implemented the DSB's recommendations, regardless of whether the complaining party disagreed about compliance. The practice of Members – including the

European Union as a responding party – confirmed this widespread understanding of Article 21.6 of the DSU. Accordingly, since the United States had informed the DSB that it had come into compliance in this dispute, there was nothing more for the United States to provide in a status report.

2.6. The representative of the European Union said that his delegation wished to recall that the CDSOA of 2000 had been found in breach of WTO rules for transferring anti-dumping and countervailing duties to the US industry. As long as the redistribution of collected duties continued, the United States would continue to be in breach of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement, and full implementation would still have to be delivered. Once the transfers of anti-dumping and countervailing duties ceased, so would the EU's measures.

2.7. The DSB took note of the statements.

3 EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. Statement by the United States

3.1. The Chairman said that this item was on the Agenda of the present meeting at the request of the United States. He then invited the representative of the United States to speak.

3.2. The representative of the United States said that, once again, the European Union had not provided Members with a status report concerning the dispute "EC – Large Civil Aircraft" (DS316). As the United States had noted at several recent DSB meetings, the EU had argued – under a different Agenda item – that where the EU as a complaining party did not agree with another responding party Member's "assertion that it has implemented the DSB ruling", "the issue remains unresolved for the purposes of Article 21.6 DSU". Under this Agenda item, however, the EU argued that by submitting a compliance communication, the EU no longer needed to file a status report, even though the United States as the complaining party disagreed that the EU had complied. At recent DSB meetings, the European Union had attempted to reconcile this view with the EU's long-standing, contrary position. The EU argued that the situation in the "US — Offset Act (Byrd Amendment)" dispute (DS217) differed from the "EC – Large Civil Aircraft" (DS316) dispute because, in the "US – Offset Act (Byrd Amendment)" dispute (DS217), the dispute had been adjudicated and there were no further proceedings pending. With this statement, the EU suggested that the issue of compliance in the "US — Offset Act (Byrd Amendment)" dispute had been adjudicated; in fact, it had not. The United States had repealed the CDSOA measure after all of the proceedings in the dispute, and the EU had not brought a challenge to the US claim of compliance. By way of contrast, in the "EC – Large Civil Aircraft" dispute (DS316), the EU's claim of compliance had already been rejected by the DSB through its adoption of compliance panel and appellate reports. The EU had also erroneously argued that where "a matter is with the adjudicators, it is temporarily taken out of the DSB's surveillance". There was nothing in the DSU text to support that argument, and the EU provided no explanation for how it read Article 21.6 of the DSU to contain this limitation. Under the EU's own view, the EU should be providing a status report. Yet it had failed to do so, demonstrating the inconsistency in the EU's position depending on its status as complaining or responding party. The US position had been consistent and clear: under Article 21.6 of the DSU, once a responding Member provided the DSB with a status report that announced compliance, there was no further "progress" on which it could report and, therefore, no further obligation to provide a report. But as the EU allegedly disagreed with this position, it should for future meetings provide status reports in the "EC – Large Civil Aircraft" dispute (DS316).

3.3. The representative of the European Union said that his delegation wished to start its statement with a clarification relating to the previous Agenda item relating to the "US — Offset Act (Byrd Amendment)" dispute (DS217). The United States had stated that the EU took the view that the issue of compliance had been adjudicated in that dispute. That was not correct. First, the EU wished to respond to the United States regarding its reference to that dispute. The EU wished to recall its statement that this dispute had been adjudicated and there were currently no further proceedings pending. This was a statement of fact and did not – as the United States implied – suggest that the issue of compliance had been adjudicated. Regarding the "EC – Large Civil Aircraft" dispute (DS316), as in previous DSB meetings, the United States had again implied that the EU was taking inconsistent positions under Article 21.6 of the DSU, depending on whether the EU was a complaining party or a

defending party in a dispute. That US assertion remained without merit. As the EU had repeatedly explained at past DSB meetings, the crucial point for the defending party's obligation to provide status reports to the DSB was the stage of the dispute. This dispute was at a stage where the defending party did not have an obligation to submit status reports to the DSB. The EU wished to remind delegations that, in the "EC – Large Civil Aircraft" dispute (DS316), the EU had notified to the WTO a new set of measures in a compliance communication which had been tabled at the 28 May 2018 DSB meeting. The United States had responded that the measures included in that communication did not bring the EU in full compliance with the DSB's recommendations and rulings. In light of the US position, on 29 May 2018 the EU had requested consultations with the United States, under Articles 4 and 21.5 of the DSU. These consultations had failed to resolve the dispute. Consequently, the EU had asked for the establishment of a compliance panel. The compliance Panel had been established by the DSB on 27 August 2018. That compliance Panel was currently examining "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. As part of that examination, the compliance Panel had held a meeting with the parties and third parties and was assessing the parties' replies to its questions on compliance of the EU. The EU wished to stress once again that there was a compliance proceeding still ongoing in this dispute. Whether or not the matter was "resolved" in the sense of Article 21.6 was the very subject matter of this ongoing litigation. The EU questioned how it could be said that the defending party should submit "status reports" to the DSB in these circumstances. The EU would be very concerned with a reading of Article 21.6 of the DSU that would require the defending party to notify the purported "status of its implementation efforts" through the submission of status reports to the DSB, while dispute settlement proceedings on that precise issue were ongoing. The EU's view was further supported by Article 2 of the DSU on the administration of the dispute settlement rules and procedures: where, further to the disagreement between the parties on compliance, a matter was with the adjudicators, it was temporarily taken out of the DSB's surveillance.

3.4. The DSB took note of the statements.

4 TURKEY – CERTAIN MEASURES CONCERNING THE PRODUCTION, IMPORTATION AND MARKETING OF PHARMACEUTICAL PRODUCTS

A. Request for the establishment of a panel by the European Union (WT/DS583/3)

4.1. The Chairman recalled that the DSB had considered this matter at its meeting on 15 August 2019 and had agreed to revert to it, should a requesting Member wish to do so. He drew attention to the communication from the European Union contained in document WT/DS583/3. He then invited the representative of the European Union to speak.

4.2. The representative of the European Union said that his delegation wished to refer to its statement made at the 15 August 2019 DSB meeting. The EU urged Turkey to bring its measures in line with its WTO obligations. To this end, the EU requested, for the second time, the establishment of a panel to assess fully the measures at issue. Pursuant to Article 6.1 of the DSU, a panel had to be established at the present DSB meeting.

4.3. The representative of Turkey said that his country deeply regretted that the European Union had requested the establishment of a panel in this dispute for a second time. As Turkey had explained in its statement addressing the EU's request at the 15 August 2019 DSB meeting, the EU's request was misplaced, and its claims were unfounded. The matter raised in the EU's request related to Turkey's social security system and policies that were aimed at ensuring a fair, affordable and uninterrupted access to medicines for all patients in Turkey. These healthcare policies, and any specific measure taken in that context, were fully consistent with Turkey's rights and obligations under the WTO covered agreements. Turkey regretted that, despite its good faith efforts to reach a mutually acceptable solution, the European Union had decided to maintain its allegations and to challenge what were essentially measures adopted to ensure that patients in Turkey had a reliable and affordable access to healthcare. Turkey considered that any concerns relating to its public health policies were not matters that should be referred to a panel. Turkey, therefore, did not agree with the establishment of a panel as requested by the European Union at the present meeting.

4.4. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

4.5. The representatives of Brazil, Canada, China, India, Japan, the Russian Federation, Switzerland, Ukraine, and the United States reserved their third-party rights to participate in the Panel's proceedings.

5 INDIA – ADDITIONAL DUTIES ON CERTAIN PRODUCTS FROM THE UNITED STATES

A. Request for the establishment of a panel by the United States (WT/DS585/2)

5.1. The Chairman drew attention to the communication from the United States contained in document WT/DS585/2. He then invited the representative of the United States to speak.

5.2. The representative of the United States said that the United States was requesting a panel to address India's measures that were plainly inconsistent with the fundamental WTO obligation to provide Most-Favoured-Nation (MFN) treatment and treatment no less favourable than that provided for in a Member's Schedule of Concessions, as set out respectively in Articles I and II of the GATT 1994. In particular, India had imposed additional duties on US products with an annual trade value of approximately US$1.1 billion. India's measures imposing these additional duties breached its MFN obligation under Article I of the GATT 1994, and India's commitments under Article II of the GATT 1994 to abide by its tariff concessions. As the DSB was aware, several WTO Members were unilaterally retaliating against the United States for actions it had taken pursuant to Section 232 that, as national security actions, were fully justified under Article XXI of the GATT 1994. These Members, including India, were pretending that the US actions under Section 232 were so-called "safeguards", and further pretended that their unilateral, retaliatory duties constituted suspension of substantially equivalent concessions under the WTO Agreement on Safeguards. Just as these Members appeared ready to undermine the dispute settlement system by throwing out the plain meaning of Article XXI and 70 years of practice, so too were they ready to undermine the WTO by pretending they were following WTO rules while taking measures blatantly against those rules. The United States knew even from their own actions that many of these Members did not seriously believe that the US security measures under Section 232 were safeguards. India, for example, had not addressed whether its action was in response to an alleged "safeguard" taken as a result of an absolute increase in imports. If there had been an absolute increase, the right to suspend substantially equivalent concessions under the Safeguard Agreement could not be exercised for the first three years of the safeguard measure. To be clear: Article XIX of the GATT 1994 could be invoked by a Member to depart temporarily from its commitments in order to take emergency action with respect to increased imports. The United States, however, was not invoking Article XIX as a basis for its Section 232 actions. Thus, Article XIX and the Safeguards Agreement were not relevant to the US actions under Section 232, and the United States had not utilized its domestic law on safeguards to take the actions under Section 232. Because the United States was not invoking Article XIX, there was no basis for another Member to pretend that Article XIX should have been invoked and to use safeguards rules that were simply inapplicable. The additional, retaliatory duties were nothing other than duties in excess of India's WTO commitments and were applied only to the United States, contrary to India's MFN obligation. The United States would not permit its businesses, farmers, and workers to be targeted in this WTO-inconsistent way. For these reasons, the United States requested that the DSB establish a panel to examine this matter with standard terms of reference.

5.3. The representative of India said that his country was disappointed with the United States for deciding to move forward with the present request for the establishment of a panel on India's measures concerning additional duties on certain products from the United States. India believed that consultations held with the United States on 1 August 2019 had been constructive. During these consultations, India, proactively and in good faith, had explained its measures. The United States had imposed additional duties on aluminium and steel articles through presidential proclamations number 9704 and 9705 dated 8 March 2018 and their related and successive measures. India had requested consultations under Article 12.3 of the Agreement on Safeguards on 17 April 2018. On 18 April 2018, the United States had declined the request for consultations. Therefore, pursuant to Article 12.5 of the Agreement on Safeguards, on 18 May 2018, India had notified its proposed suspension of concessions and other obligations referred in Article 8.2 of the Agreement of Safeguards to the WTO. On 13 June 2018, India had submitted a revision in the list of goods on which concessions and other obligations were proposed to be suspended. India noted that several Members, including India, had initiated disputes against the additional duties on aluminium and steel articles imposed by the United States through presidential proclamations 9704 and 9705 dated

8 March 2018, and their related and successive measures. India considered that these additional duties were nothing but disguised safeguard measures to protect the US domestic industry. At the same time, the United States had also brought disputes against the suspension of concessions and other obligations by several Members, that currently included India, which these Members had adopted in response to the US safeguard measures. The core issue in all these disputes was whether the US measures were safeguard measures. In the present dispute, brought by the United States, the United States had made claims only under Articles 1 and 2 of the GATT 1994, and did not refer to the actual controlling provisions, that is, Article 19.3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards. It was clear that re-balancing in response to a safeguard measure fell within the ambit of Article 19.3(a) of the GATT 1994 and Article 8 of the Agreement on Safeguards. The United States was not entitled to modify or suspend its schedules in order to protect its domestic industries at will and without consequence. For these reasons, India was confident that it would prevail in this dispute and that its actions would be declared a permitted and proportionate response to the US safeguard measures disguised as national security measures. India did not accept the establishment of a panel at the present meeting in this dispute.

5.4. The representative of China said that his country noted that this dispute related to a WTO Member's re-balancing measures in response to Section 232 measures adopted by the United States. As China had explained on many occasions, Section 232 measures were disguised safeguard measures. They were aimed at the protection of US domestic sectors by using tariffs to limit steel and aluminium imports. China recalled that nine Members had brought Section 232 measures to the dispute settlement proceedings and seven Panels were currently conducting scrutiny regarding these issues. The unprecedented number of complaints and the wide attention granted to this matter throughout the world could suggest a general opposition to US unilateralism. In that regard, China supported that Members wished to safeguard their legitimate interests by taking re-balancing measures in accordance with WTO rules.

5.5. The representative of the European Union said that the DSB had already considered the previous US panel requests that were similar to the one tabled at the present meeting against India. The EU had spoken in relation to the US panel request that related to the EU's suspension of equivalent GATT obligations in response to the undeclared safeguard measures which the United States had taken in support of its steel and aluminium industries. The EU welcomed the fact that India, like quite a number of other WTO Members, had resorted to its right to suspend equivalent obligations vis-à-vis the United States. The EU looked forward to defending, before the established Panels, its right and the right of other WTO Members to suspend equivalent obligations, and to defending the rules-based multilateral trading system.

5.6. The DSB took note of the statements and agreed to revert to this matter should a requesting Member wish to do so.

6 MOROCCO – DEFINITIVE ANTI-DUMPING MEASURES ON SCHOOL EXERCISE BOOKS FROM TUNISIA

A. Request for the establishment of a panel by Tunisia (WT/DS578/2)

6.1. The Chairman drew attention to the communication from Tunisia contained in document WT/DS578/2. He then invited the representative of Tunisia to speak.

6.2. The representative of Tunisia said that the Tunisian delegation, on 9 September 2019, had submitted to the DSB a communication requesting the establishment of a panel to examine the matter of definitive anti-dumping measures taken by Morocco on school exercise books from Tunisia. This was the first dispute that Tunisia had brought to the WTO. First, Tunisia wished to underscore the following. Consultations relating to definitive anti-dumping measures taken by Morocco on school exercise books from Tunisia had taken place at the WTO on 11 and 12 June 2019. On 22 May 2019, Tunisia had submitted to Morocco a questionnaire with 71 questions concerning the allegations listed in its request for consultations. The parties addressed most of the questions during the consultations and then held a small group meeting to seek a mutually acceptable solution to this dispute. The discussions had not led to the settlement of this dispute. From Tunisia's standpoint, the consultations seemed to corroborate the multiple preoccupations of Tunisia as to the anti-dumping measures at issue, in terms of the launch of the investigation, in terms of the analysis of dumping, injury and causal link, as well as procedure. Thus, Tunisia had decided to bring this dispute before a panel. In view of Tunisia's experience with this brotherly country, this option would best protect Tunisia's legal

interests. The dispute had unfortunately not been resolved through direct exchanges between the two countries. As such, the assistance of a third party to seek a solution in this dispute seemed necessary at this stage. In its request for the establishment of a panel, Tunisia had decided to pursue the most salient allegations. Tunisia would not wish to discuss these in detail at this stage. In conclusion, Tunisia requested that the DSB establish a panel to examine this matter. This panel request was without prejudice to the parties' right to potentially use conciliation or mediation pursuant to Article 5 of the DSU. Tunisia hoped to resolve this matter with its brotherly country as soon as possible.

6.3. The representative of Morocco said that his country deeply regretted Tunisia's decision to request the establishment of a panel in the context of this dispute. Morocco considered that the anti-dumping duty challenged by Tunisia had been applied pursuant to Members' obligations under Article VI of the GATT 1994 and under the WTO Agreement on the Implementation of this Article. As Morocco had indicated to Tunisia in the course of previous discussions, the matter at issue between Tunisia and Morocco was limited to technical considerations that should not have led the two countries to engage in formal dispute settlement proceedings at the WTO. During the consultations, Morocco had demonstrated flexibility and had proposed constructive solutions as well as fair options to resolve this dispute. Morocco wished to underscore that Tunisia's allegations affected the ability and rights of Moroccan authorities, as well as those of other least-developed countries (LDCs) and developing countries, to defend themselves in the future against potential distortions caused by much larger trading partners. Finally, in view of Morocco's willingness to pursue efforts to resolve this dispute amicably rather than through litigation, Morocco was not in a position to accept the establishment of a panel at the present meeting. Morocco wished to have more time to reach a mutually satisfactory solution in order to resolve this issue amicably.

6.4. The DSB took note of the statements and agreed to revert to this matter.

7 UKRAINE – ANTI-DUMPING MEASURES ON AMMONIUM NITRATE

A. Report of the Appellate Body (WT/DS493/AB/R and WT/DS493/AB/R/Add.1) and Report of the Panel (WT/DS493/R; WT/DS493/R/Add.1 and WT/DS493/Corr.1)

7.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS493/9 transmitting the Appellate Body Report in the dispute: "Ukraine – Anti-Dumping Measures on Ammonium Nitrate ", which had been circulated on 12 September 2019 in document WT/DS493/AB/R and Add.1. He reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

7.2. The representative of the Russian Federation said that her country welcomed the Report of the Appellate Body in this dispute and wished to present compliments to the Panel and Appellate Body members for their well-thought and forward-looking findings and conclusions in this dispute. The Russian Federation also wished to present compliments to the WTO Secretariat team for its hard work in this dispute. The results of this dispute were vital and beneficial for the entire WTO Membership. Its outcome contributed to the resolution of highly important issues of application and interpretation of certain provisions of the Anti-Dumping Agreement, *inter alia* Articles 2.2 and 2.2.1.1, in line with the findings in the "EU – Biodiesel" dispute (DS473). The Russian Federation wished to draw attention of the WTO Members specifically to the following issues.

7.3. First, Russia wished to discuss the application and interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement, the problems relating to the application and interpretation of Article 2.2.1.1 had been considered back in 2002. In document TN/RL/W/10 dated 18 June 2002, the group of countries that called themselves "Friends of Anti-Dumping Negotiations" or "FANs" had stated: "[t]his provision is not specific enough to clarify the circumstances in which authorities may reject or adjust cost data as maintained in the producer's own cost accounting records. This ambiguity allows the authorities to reconstruct a producer's costs arbitrarily…". "FANs" were concerned that: "this reconstruction of costs could also create artificial dumping margins". Ambiguity

over the interpretation of Article 2.2.1.1 of the Anti-Dumping Agreement had led to the situation in the current dispute, in which the Ukrainian investigating authorities had found a way to self-servingly interpret the language of that provision, in order to unlawfully reject the recorded costs of Russian exporters and create an artificial basis for higher anti-dumping duties. Moreover, the insufficient clarity specific to the interpretation of Article 2.2.1.1 inspired some other Members to create a universe of reasons to reject exporters' costs that satisfied the conditions in the first sentence of that Article, which led to the imposition of anti-dumping duties inconsistent with their WTO obligations.

7.4. Second, with respect to the interpretation and application of Article 2.2 of the Anti-Dumping Agreement, Russia said that the Appellate Body had concluded that, in its determination of the normal value, "an investigating authority has to ensure that the information it collects is used to arrive at the cost of production in the country of origin". Therefore, in order to comply with this obligation under Article 2.2, investigating authorities should adapt the information specifically to reflect the costs in the country of origin. This dispute illustrated how dangerously far from the text of the Anti-Dumping Agreement certain Members attempted to go when searching for costs data in their determination of the normal value. However, Russia asked whether there was anything in the text of the Anti-Dumping Agreement that allowed an investigating authority to prefer surrogate prices for inputs and to make some sort of cost adjustments using these surrogate prices, which in fact reflected anything but the costs of production incurred by producers in the country of origin. The answer was "nothing". Russia also asked what could better reflect the costs of production in the country of origin than the duly recorded costs of the producers. The answer was also "nothing".

7.5. Russia said that the text of the Anti-Dumping Agreement should not be compromised. Its provisions had to be respected. The balance between rights and obligations of exporters and investigating authorities had to be maintained. It was also noteworthy that the outcome of the present dispute confirmed the lawful and truthful understanding of differences in the text and function between Article 2.2 of the Anti-Dumping Agreement and Article 14(d) of the SCM Agreement. Consequently, the Appellate Body had concluded that some of its interpretations of the SCM Agreement "are not relevant to the interpretive exercise under Article 2.2". As a general comment, the Russian Federation wished to note that the interpretation and application of provisions should not be influenced by forum shopping considerations. The objective foundation, on which the whole WTO legal system stood, had to be maintained. Once more, Russia wished to pay tribute to the decisions of the Panel and the Appellate Body for not allowing the flooding of international trade with unlawful anti-dumping practices and for contributing to the security and predictability of the multilateral trading system. Any attempted trick using the text of the Anti-Dumping Agreement was akin to juggling a chainsaw, which could strike back with an unpleasant surprise. At the present meeting, Russia respectfully requested that the DSB adopt the Appellate Body Report pursuant to Article 17.14 of the DSU and the Panel Report in this dispute. The Russian Federation hoped that Ukraine would comply with the DSB's recommendations and rulings that were requested to be adopted at the present meeting.

7.6. The representative of Ukraine said that her delegation thanked the Appellate Body, the Panel and the Secretariat for their hard work in this dispute. Ukraine further thanked all third parties for their constructive participation during the course of the proceedings. Ukraine appreciated the fact that the Appellate Body and the Panel had upheld the general framework of Ukrainian anti-dumping law and practice. Ukraine was also pleased that the Appellate Body and the Panel had upheld the principle of cost adjustment methodology. Ukraine took note of the Appellate Body's clarification that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement contained no separate standard of reasonableness which governed the meaning of the term "costs" itself. This would allow investigating authorities to disregard domestic input prices when such prices were lower than other prices internationally.[3] Ukraine also took note of the Appellate Body's clarification that Article 2.2 of the Anti-Dumping Agreement did not preclude an investigating authority from adapting information it collected as long as the investigating authority ensured that such information was used to arrive at the "cost of production in the country of origin".[4] Ukraine further welcomed the fact that the Panel had rejected the majority of the remainder of the claims of the Russian Federation, *inter alia*, the claims that Ukrainian authorities would have acted inconsistently with Articles 11.1, 11.2, and 11.3 of the Anti-Dumping Agreement, in connection with the Ukrainian authorities' determination of, and reliance on, injury allegedly not established in accordance with Articles 3.1 and 3.4 of the Anti-Dumping Agreement in making their

[3] Appellate Body Report, "Ukraine -Ammonium Nitrate" (Russia), para. 6.124.
[4] Appellate Body Report, "Ukraine -Ammonium Nitrate" (Russia), para. 6.128.

likelihood-of-injury determination. Having said all that, Ukraine was concerned as to the Panel and the Appellate Body's analysis and justification with respect to the assertions that the 2008 amended decision and the 2010 amendment had been "identified" as measures at issue in Russia's panel request and had been allegedly within the Panel's terms of reference. Furthermore, Ukraine was disturbed with the Panel and the Appellate Body's findings that the "combined effect" of the court judgments and the 2010 amendment had been that the dumping margin for EuroChem in the original investigation phase had been *de minimis*,[5] as neither the 2010 amendment nor the judgments of Ukrainian Courts had ever stated or concluded that the dumping margin in question had been *de minimis*. Regardless, Ukraine emphasized that it intended to fully comply with the relevant WTO rules and its obligations under the DSU.

7.7. The representative of the United States said that the United States wished to raise an important systemic concern. The United States considered that very serious issues were raised by the failure of the Appellate Body to follow the mandatory 90-day deadline in Article 17.5 of the DSU and the continued service on this appeal of an individual who had ceased to be a member of the Appellate Body during the appeal, including with respect to the status of such a report. As the document had not been issued by three Appellate Body members and had not been issued within 90 days, consistent with the requirements of Article 17 of the DSU, it was not an "Appellate Body report" under Article 17, and therefore it was not subject to the adoption procedures reflected in Article 17.14. For this item, the United States did not understand any party to oppose adoption of the reports, nor had any other WTO Member raised an objection. The aim of the dispute settlement system was to find a positive solution to the dispute. As neither party to the dispute had objected, the United States understood that the parties considered that adoption of the reports would assist them in finding a positive solution. The United States would seek to support the parties' interests on this issue. Therefore, there was a consensus to adopt the reports before the DSB at the present meeting.

7.8. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS493/AB/R and Add.1 and the Panel Report contained in WT/DS493/R, Add.1 and Corr. 1, as upheld by the Appellate Body Report.

8 KOREA – ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN

A. Report of the Appellate Body (WT/DS504/AB/R and WT/DS504/AB/R/Add.1) and Report of the Panel (WT/DS504/R and WT/DS504/R/Add.1)

8.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS504/9 transmitting the Appellate Body Report in the dispute: "Korea – Anti-Dumping Duties on Pneumatic Valves from Japan", which was circulated on 10 September 2019 in document WT/DS504/AB/R and Add.1. He wished to remind delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

8.2. The representative of Japan said that his country wished to express its appreciation for the time and effort devoted to this dispute by the Panel, the Appellate Body and their respective Secretariats. Japan welcomed the findings by the Appellate Body and the Panel, as modified by the Appellate Body, that Korea's measures imposing anti-dumping duties on pneumatic valves from Japan were inconsistent with the Anti-Dumping Agreement, and their recommendations that Korea bring its measures into conformity with its obligations under the Anti-Dumping Agreement. Japan therefore requested that the Reports be adopted by the DSB. The Appellate Body had ruled in favour of Japan with respect to nearly all of the issues that had been raised in this appeal. In particular, Japan's core claims in this dispute included the lack of price comparability between Japanese valves with higher values and functions, on the one hand, and Korean low-end domestic valves, on the other hand. Both the Panel and the Appellate Body had determined that Korea had failed to ensure price comparability either under Article 3.2 or Article 3.5 of the Anti-Dumping Agreement, and thus

[5] Appellate Body Report, "Ukraine -Ammonium Nitrate" (Russia), para. 6.57.

had failed to demonstrate that the imports from Japan had actually caused injury to Korea's domestic industry. Also, the Appellate Body had upheld the Panel's findings that Korea had failed to comply with the requirement to appropriately treat confidential information in its investigations under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

8.3. Japan called on Korea to fully and promptly implement the DSB's recommendations and rulings in accordance with the Article 21 of the DSU following the adoption of the reports without maintaining or introducing any measure which would undermine their implementation. Another key feature of the Appellate Body Report had been the reversals of the Panel's erroneous findings on its terms of reference under Article 6.2 of the DSU. Specifically, accepting Japan's appeal on this jurisdictional issue, the Appellate Body had reversed the Panel's erroneous decision not to rule on Japan's claims under various provisions including Articles 3.2, 3.4, 4.1 and 6.9 of the Anti-Dumping Agreement on the basis that these claims fell outside of its terms of reference. Since the WTO dispute settlement system served to achieve a satisfactory settlement of disputes between Members, a panel's erroneous decision not to rule on key issues on jurisdictional grounds not only contradicted the established jurisprudence, but was also contrary to the very objective of the dispute settlement system. Japan highly appreciated the Appellate Body's correct decision on this issue.

8.4. Japan noted that a Korean government official had made a comment in a newspaper column asserting that: "[t]he core element of this case is whether Korea could continue the anti-dumping duty, and it was effectively decided that Korea could". This comment simply defied the Appellate Body's conclusions. Japan was puzzled by this groundless contention. Indeed, nowhere in the Report did the Appellate Body allow Korea to "continue the anti-dumping duty". Rather, the Appellate Body had clearly determined the WTO-inconsistency of Korea's anti-dumping measures at issue and had recommended that Korea bring its measures into conformity with the substantive provisions of the Anti-Dumping Agreement. Korea's assertion would defy the Appellate Body's recommendation and would run counter to the very objective of the dispute settlement system to resolve a dispute. It was also regrettable that some Korean officials had characterized the Report as one in which Korea's arguments had prevailed by counting and comparing the number of claims in respect of which the Appellate Body had made findings of WTO-inconsistency had been and the number of claims in respect of which no such finding had been made. To be clear, under the Anti-Dumping Agreement, in order to impose an anti-dumping duty, an importing Member had to establish: (i) the existence of dumping; (ii) injury to the domestic industry; (iii) causation between the dumping and the injury; through (iv) an appropriate procedure of anti-dumping investigation. The lack of even one out of these four core legal requirements would legally prevent the Member from imposing anti-dumping duties. Ultimately, it was not in the mere number of claims and arguments that the Panel and the Appellate Body had ruled in favour or against. Rather, it was whether or not the measures at issue had fulfilled all the requirements of the WTO Agreement. In this dispute, Korea's anti-dumping measures had not. Finally, Japan believed that these findings would lead to a definitive resolution of this dispute. Japan stood ready to engage in dialogue with Korea in a constructive manner in the coming weeks, with a view to achieving prompt and full compliance by Korea with the DSB's recommendations and rulings so as to secure a positive solution to this dispute.

8.5. The representative of Korea said that his country welcomed the Appellate Body Report in this dispute. Korea found it important that the Appellate Body had properly upheld the Panel's rejection of Japan's claim that an investigating authority had to conduct a "but for" test by estimating the impact of dumped imports on the domestic industry absent "dumping", i.e., where the dumped imports were imported at their normal value. Had Japan's claim been upheld, investigating authorities around the globe would have been faced with an unduly burdensome, if not nearly impossible, task of having to simulate the precise economic impact of dumping margins in each and every injury investigation. As found by the Panel, and as rightly maintained by the Appellate Body, such a mandatory counterfactual analysis had no place under Article 3 of the Anti-Dumping Agreement. Korea also supported the Appellate Body's finding upholding a key claim made on appeal by Korea regarding the Panel's causation-related finding. At the request of Korea, the Appellate Body had rightly reversed the Panel's finding that price effect analysis undertaken by the Korea Trade Commission (KTC) had violated Article 3.5 of the Anti-Dumping Agreement, which required the establishment of a causal link between the dumped imports and injury to the domestic industry. Together with the findings of the Panel that had been upheld, the Appellate Body had thus confirmed that Japan had failed to demonstrate that the KTC's causation analysis had been in any way inconsistent with Article 3.5. In addition, Korea noted with satisfaction that the Appellate Body had reduced the claimed inconsistency in respect of an aspect of the price effects analysis undertaken by the KTC to a technical matter about the need for additional reasoning and consideration, without

finding fault with the overall price and injury analysis as such. Korea would take this guidance for additional explanation and consideration on board as it implemented the DSB's recommendations and rulings in this dispute.

8.6. Korea respectfully disagreed with Japan to the extent that Japan suggested that Korea had to necessarily terminate its anti-dumping measure on pneumatic valves from Japan in order to comply with the Appellate Body Report. The Panel and the Appellate Body had collectively found that in 10 out of its 13 claims, Japan had failed to demonstrate that Korea's anti-dumping measure was inconsistent with any of the provisions of the Anti-Dumping Agreement. Aside from the two procedural matters that had been faulted, only one substantive flaw had been recognized by the Panel and the Appellate Body. Korea considered that nothing in these Reports of the Panel and Appellate Body suggested that the only way to implement the rulings was to withdraw the measure. In fact, given the very limited nature of the technical concerns expressed with only one aspect of the injury analysis, and given the confirmation of the consistency of the KTC's causation analysis, it was clear that there was no basis for such a suggestion. In addition, Korea noted that Japan could have, but had not, requested the Panel or Appellate Body to make such a suggestion. Korea also noted that Japan had decided not to object to the KTC's dumping margin calculation from the beginning, and thus Korea would not be under the obligation to adjust or modify its anti-dumping duty due to the Appellate Body Report.

8.7. Korea said that Japan insisted that the Appellate Body had found the KTC's definition of domestic industry to be inconsistent with the Anti-Dumping Agreement. However, Japan was completely mistaken in this regard. The Appellate Body had never found that the KTC's definition of domestic industry had been inconsistent with the Anti-Dumping Agreement. While the Appellate Body had reversed the Panel's finding that the claim under Articles 3.1 and 4.1 had been outside of the Panel's terms of reference, the Appellate Body had decided not to complete the legal analysis. In addition, the Appellate Body had reversed the Panel's finding in relation to Article 6.2 of the DSU for five claims but had nevertheless decided not to complete the analysis for four claims. The one claim for which the Appellate Body had completed the analysis only related to the methodological flaws of the KTC's price effect analysis. For all of the reasons just explained, therefore, it was hard to find any substantial implication in the reversal. As Korea had already explained, the Appellate Body's finding of inconsistency was limited to "some" methodological flaws in the KTC's price effect analysis and a procedural matter. It was simply incorrect to assert that the corollary of the methodological flaws with limited implications found by the Appellate Body was the complete termination of the current anti-dumping measure. Such a bold assertion would call for a fundamental change in the notion under which the Members had implemented WTO rulings. All in all, Korea welcomed the Appellate Body's ruling that mostly upheld Korea's position. Korea believed that the Appellate Body Report in this dispute was yet another example of the value and utility of the appeal mechanism in the multilateral trading system. Korea wished to take this moment to reiterate its commitment to supporting a properly functioning Appellate Body. Finally, Korea confirmed its willingness to faithfully implement the rulings of the Appellate Body in this dispute within a reasonable period of time pursuant to Article 21 of the DSU.

8.8. The representative of Japan said that, under the Anti-Dumping Agreement, in order to impose an anti-dumping duty, an importing Member had to establish four core requirements: (i) the existence of dumping; (ii) injury to the domestic industry; (iii) causation between the dumping and the injury; through (iv) an appropriate procedure of anti-dumping investigations. The lack of even one out of these four core legal requirements would legally prevent the Member from implementing anti-dumping duties. The Appellate Body's findings included Korea's failure to demonstrate the price comparability, which related to the third element of causation, and Korea's failure to properly treat confidential information, which related to the fourth element of due process. This meant that Korea's measures had failed to meet the fundamental requirements under the Anti-Dumping Agreement. Korea's statements were misleading. Such an approach might also foster the abuse of protectionist trade remedy measures around the world. Moreover, Japan wished to clarify that Korea's comments on its "win" in "10 out of 13" claims were not only misleading but were simply factually incorrect. Out of 13 claims, as set out in the Japan's panel request in this dispute, six were with respect to the investigations on the injury to the domestic industry and on its causation with the dumping. The Appellate Body had accepted Japan's core claim and argument, i.e., the lack of price comparability and price effect, and had ruled unequivocally that Korea' investigating authority had acted inconsistently with Article 3.2 of the Anti-Dumping Agreement. Facing the same facts and legal arguments, the Panel had applied Article 3.5 to Korea's violation, but the Appellate Body had

corrected the relevant provision from Article 3.5 to Article 3.2. Korea seemed to insist on its "win" in this issue, only based on this technical shift in the relevant Article to be applied from Article 3.5 to Article 3.2. This shift did not change the substance of Korea's breach of its WTO obligations or its implementation obligations. Importantly, Japan's core claim on the lack of price comparability between Japanese valves with higher value and functions, on the one hand, and Korean low-end domestic valves, on the other hand, had been affirmed by both the Panel and the Appellate Body. Japan believed that it was not just a methodological fraud: it was a substantive fraud. Korea ultimately had been found to have failed to confirm the price comparability and to have failed to demonstrate that the imports from Japan had actually caused injury to the Korean domestic industry. Korea, therefore, had to fundamentally correct its WTO-inconsistent measure in order to comply with the DSB's recommendations and rulings in this dispute.

8.9. The representative of Korea noted that it was simply incorrect for Japan to assert that a corollary of the two methodological flaws with limited implications was a complete termination of the current anti-dumping measure. Korea, therefore, disagreed with Japan's suggestion that Korea had to terminate, or otherwise essentially modify or adjust, its anti-dumping measure on pneumatic valves from Japan in order to comply with the Appellate Body Report. Korea confirmed its willingness to faithfully implement the rulings of the Appellate Body within a reasonable period of time pursuant to Article 21 of the DSU.

8.10. The representative of the European Union wished to note the EU's position with respect to two elements of the Appellate Body Report. First, the EU recalled that the Appellate Body said in this dispute that: "[a]s soon as price comparisons are made, price comparability necessarily arises as an issue". The EU agreed that price comparability was an essential element that deserved careful examination in the context of an investigation under the Anti-Dumping Agreement. The second point was in relation to the appellate findings on the Panel's terms of reference. The EU agreed with the Appellate Body's statement that: "[s]pecifically, the reference to the phrase 'how or why' in certain past disputes did not indicate a standard different from the requirement that a panel request include a 'brief summary of the legal basis … sufficient to present the problem clearly' within the meaning of Article 6.2 of the DSU" which had been at the heart of the Panel's reasoning.

8.11. The representative of the United States said that the United States wished to raise an important systemic concern. The United States considered that very serious issues were raised by the failure of the Appellate Body to follow the mandatory 90-day deadline in Article 17.5 of the DSU, and the continued service on this appeal of an individual who had ceased to be a member of the Appellate Body during the appeal, including with respect to the status of such a report. As the document had not been issued by three Appellate Body members and had not been issued within 90 days, consistent with the requirements of Article 17 of the DSU, it was not an "Appellate Body report" under Article 17, and therefore it was not subject to the adoption procedures reflected in Article 17.14. For this item, the United States did not understand any party to oppose adoption of the reports, nor had any other WTO Member raised an objection. The aim of the dispute settlement system was to find a positive solution to the dispute. As neither party had objected, the United States understood that the parties considered that adoption of the reports would assist them in finding a positive solution. The United States would seek to support the parties' interests on this issue. Therefore, there was a consensus to adopt the reports before the DSB at the present meeting.

8.12. The representative of Canada said that, as a general matter, Canada wished to note that Appellate Body reports that were issued passed ninety days were still Appellate Body reports subject to the negative consensus rule of Article 17.14 of the DSU.

8.13. The representative of China said that this statement related to Agenda items 7 and 8. China noted that the United States had suggested the negative consensus rule could not be applied to the adoption of this Report since it had not been circulated within 90 days and one of the adjudicators had ceased to be an Appellate Body member before the Report had been circulated. China disagreed with this. China wished to stress that the Report before the DSB was an Appellate Body Report that had to be adopted under the negative consensus rule set out in Article 17.14 of the DSU. Article 17.14 of the DSU was crystal clear that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members". Members had the right to express their views on any Appellate Body report. However, as a matter of law, whatever Members said, whatever they did and whatever was recorded in the minutes of the DSB meeting was incapable of negating the unconditional application of the negative consensus rule

provided for in Article 17.14 of the DSU. At the present meeting, there was no consensus among Members not to adopt this Appellate Body Report. Therefore, this Appellate Body Report had to be adopted in accordance with Article 17.14 of the DSU. Any suggestion to derogate from the application of the negative consensus rule or impose precondition to it was without legal merit.

8.14. The representative of the European Union said that the United States had made certain statements both under this Agenda item and under the previous Agenda item by referring to Article 17.14 of the DSU. The EU wished to respond to these statements. The EU had noted that the Chairman had introduced these two Agenda items with a reference to Article 17.14 of the DSU. Indeed, that Article provided that Appellate Body reports were to be adopted by the DSB and unconditionally accepted by the parties. The only circumstance in which this did not occur was if the DSB decided by consensus not to adopt the Appellate Body report. This was not happening at the present meeting, because the EU did not, and would not, join such a consensus. As China had just mentioned, neither the defending party, nor any other WTO Member, not even the Chairman of the DSB or the WTO Secretariat had the legal authority to prevent this from happening by any means. Whatever any defending party or other Member might say, whatever they did, whatever was recorded in the minutes was incapable, as a matter of law, of negating the observation that what was provided for in Article 17.14 of the DSU had occurred.

8.15. The DSB took note of the statements and adopted the Appellate Body Report contained in WT/DS504/AB/R and Add.1 and the Panel Report contained in WT/DS504/R and Add.1, as modified by the Appellate Body Report.

9 PROPOSED NOMINATION FOR THE INDICATIVE LIST OF GOVERNMENTAL AND NON-GOVERNMENTAL PANELISTS (WT/DSB/W/652)

9.1. The Chairman drew attention to document WT/DSB/W/652 which contained a new name proposed by Qatar for inclusion on the Indicative List of Governmental and Non-Governmental Panelists, in accordance with Article 8.4 of the DSU. He then proposed that the DSB approve the name contained in document WT/DSB/W/652.

9.2. The representative of Saudi Arabia speaking also on behalf of the Kingdom of Bahrain, Egypt and the United Arab Emirates, recalled that Article 2.4 of the DSU stated that: "[w]here the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus". Therefore, and after a careful review of the proposed nomination indicated in document WT/DSB/W/652 to be included on the Indicative List of Governmental and Non-Governmental Panelists, Saudi Arabia and the three other Members on whose behalf it was making this statement had concluded that they did not support this nomination, and therefore did not agree to include the proposed name on the Indicative List of Governmental and Non-Governmental Panelists.

9.3. The representative of Qatar said that, to Qatar's knowledge, this was the first time in the 25-year history of the WTO and the DSB that a delegation had objected to the nomination of a candidate for inclusion on the Indicative List. Qatar deeply regretted that Saudi Arabia, Egypt, the UAE and Bahrain had chosen to use this opportunity to attempt to score political points. By doing so, they disrespected this institution and brought discredit to the delegations of Saudi Arabia, Egypt, the UAE and Bahrain. Qatar noted that Saudi Arabia, Egypt, the UAE and Bahrain had objected on the ground that the candidate was Qatari. As Article 8.9 of the DSU made clear, panelists served independently and in an individual capacity, and not as government representatives. This was not consistent with the nature of the WTO as a multilateral organization that Members could veto individuals because of their nationality.

9.4. The Chairman recalled that, in order to add the name proposed by Qatar to the Indicative List of Governmental or Non-Governmental Panelists, this nomination had to be approved by the DSB pursuant to Article 8.4 of the DSU, which stipulated that: "Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB". As Members were aware, such approval by the DSB required to be done by consensus, as set out in Article 2.4 of the DSU, which stipulated that: "Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus". He regretted that, at the present meeting, it was not possible to take a decision on this matter.

9.5. The DSB took note of the statements.

10 APPELLATE BODY APPOINTMENTS: PROPOSAL BY ANGOLA; ARGENTINA; AUSTRALIA; BENIN; PLURINATIONAL STATE OF BOLIVIA; BOTSWANA; BRAZIL; BURKINA FASO; BURUNDI; CABO VERDE; CAMEROON; CANADA; CENTRAL AFRICAN REPUBLIC; CHAD; CHILE; CHINA; COLOMBIA; CONGO; COSTA RICA; CÔTE D'IVOIRE; CUBA; DEMOCRATIC REPUBLIC OF CONGO; DJIBOUTI; DOMINICAN REPUBLIC; ECUADOR; EGYPT; EL SALVADOR; ESWATINI; THE EUROPEAN UNION; GABON; THE GAMBIA; GHANA; GUATEMALA; GUINEA; GUINEA-BISSAU; HONDURAS; HONG KONG, CHINA; ICELAND; INDIA; INDONESIA; ISRAEL; KAZAKHSTAN; KENYA; REPUBLIC OF KOREA; LESOTHO; LIECHTENSTEIN; MADAGASCAR; MALAWI; MALAYSIA; MALI; MAURITANIA; MAURITIUS; MEXICO; MOROCCO; MOZAMBIQUE; NAMIBIA; NEW ZEALAND; NICARAGUA; NIGER; NIGERIA; NORTH MACEDONIA; NORWAY; PAKISTAN; PANAMA; PARAGUAY; PERU; QATAR; RUSSIAN FEDERATION; RWANDA; SENEGAL; SEYCHELLES; SIERRA LEONE; SINGAPORE; SOUTH AFRICA; SWITZERLAND; THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU; TANZANIA; THAILAND; TOGO; TUNISIA; TURKEY; UGANDA; UKRAINE; URUGUAY; THE BOLIVARIAN REPUBLIC OF VENEZUELA; VIET NAM; ZAMBIA AND ZIMBABWE (WT/DSB/W/609/REV.14)

10.1. The Chairman said that this item was on the Agenda of the present meeting at the request of Mexico, on behalf of a number of delegations. He drew attention to the proposal contained in document WT/DSB/W/609/Rev.14 and invited the representative of Mexico to speak.

10.2. The representative of Mexico, speaking on behalf of the co-sponsors of the joint proposal contained in document WT/DSB/W/609/Rev.14, said that the delegations in question had agreed to submit the joint proposal dated 19 September 2019 to launch the AB selection processes. Mexico welcomed Malaysia and Thailand as new co-sponsors of the joint proposal. Her delegation, on behalf of these 116 Members, wished to make the following statement. The increasing and considerable number of Members submitting this joint proposal reflected a common concern with the current situation in the Appellate Body that was seriously affecting its functioning and the overall dispute settlement system against the best interest of its Members. WTO Members had the responsibility to safeguard and preserve the Appellate Body, the dispute settlement system and the multilateral trading system. Thus, it was the Members' duty to launch the AB selection processes, as set out in the joint proposal before the DSB at the present meeting. This proposal sought to: "(i) start six selection processes: one process to replace Mr. Ricardo Ramírez-Hernández, whose second term expired on 30 June 2017; a second process to fill the vacancy resulting from the resignation of Mr. Hyun Chong Kim with effect from 1 August 2017; a third process to replace Mr. Peter Van den Bossche, whose second term expired on 11 December 2017; a fourth process to replace Mr. Shree Baboo Chekitan Servansing, whose four-year term of office expired on 30 September 2018; a fifth process to replace Mr. Ujal Singh Bhatia, whose second term will expire on 10 December 2019; and a sixth process to replace Mr. Thomas R. Graham whose second term will expire on 10 December 2019; (ii) to establish a Selection Committee; (iii) to set a deadline of 30 days for the submission of candidacies; and (iv) to request that the Selection Committee issue its recommendation within 60 days after the deadline for nominations of candidates". The proponents were flexible with regard to the deadlines for the AB selection processes, but believed that Members should consider the urgency of the situation. Mexico continued to urge all Members to support this proposal in the interest of the multilateral trading system and the dispute settlement system.

10.3. The representative of Thailand said that his country appreciated the continued efforts of Mexico and of all co-sponsors under this Agenda item in an attempt to fill the vacancies in the Appellate Body. Thailand was, therefore, pleased to co-sponsor the proposal contained in document WT/DSB/W/609/Rev.14 with a view to resolving the current impasse. Thailand had expressed its concerns on this critical issue at various meetings, including at DSB meetings, and had also contributed to addressing some concerns to qualifying certain aspects related to the functioning of the dispute settlement process by submitting its own proposal, dated 25 April 2019 and contained in document WT/GC/W/769 on WTO dispute settlement, at the General Council meeting in April 2019. Given the urgency of the matter, Thailand was joining the other co-sponsors of the proposal on launching the AB selection processes with a view to ensuring the effective and smooth functioning of the WTO dispute settlement system. Thailand remained committed to working constructively with all Members to resolve this matter as a priority.

10.4. The representative of the European Union said that his delegation wished to refer to its statements made on this matter at previous DSB meetings, starting in February 2017. The gravity and urgency of the situation was increasing as months went by. WTO Members had a shared responsibility to resolve this issue as soon as possible. The EU wished to thank all Members that had co-sponsored the proposal contained in document WT/DSB/W/609/Rev.14 to launch the AB selection processes. The EU invited all other Members to endorse this proposal so that new AB members could be appointed as soon as possible. The EU also wished to recall that concrete proposals had been submitted to the General Council with a view to unblocking the AB selection processes. These proposals amounted to serious attempts at responding to the concerns related to AB appointments. These proposals were currently being discussed under the auspices of the General Council Chair. The EU invited all Members to engage constructively in these discussions so that the AB vacancies could be filled as soon as possible.

10.5. The representative of the United States thanked the Chairman for the continued work on these issues. As the United States had explained at prior DSB meetings, the United States was not in a position to support the proposed decision. The systemic concerns that the United States had identified remained unaddressed. As the United States had explained at recent DSB meetings, for more than 16 years and across multiple US Administrations, the United States had been raising serious concerns with the Appellate Body's overreaching and disregard for the rules set by WTO Members. The United States would continue to insist that WTO rules be followed by the WTO dispute settlement system and would continue its efforts and its discussions with Members and with the Chairman to seek a solution on these important issues.

10.6. The representative of Brazil said that Brazil wished to refer to its statements made at previous DSB meetings regarding the urgency of launching the AB selection processes. There was a very significant majority of WTO Members that formally supported the proposal contained in document WT/DSB/W/609/Rev.14 under this Agenda item. Brazil, of course, supported the immediate launching of the AB selection processes. Otherwise, the Membership would continue to be in breach of its collective obligation to preserve a standing Appellate Body where vacancies had to be filled as they arose. Brazil, therefore, invited other WTO Members to join this proposal so that Members could meet their obligation within a reasonable period of time. Brazil commended Amb. Walker for his work under the informal process on AB matters that was taking place within the ambit of the General Council to facilitate the resolution of this impasse and looked forward to engaging with Members in the next steps of that process.

10.7. The representative of Ecuador, speaking on behalf of the Group of Latin American and Caribbean countries (GRULAC) that were Members of the WTO, said that his delegation noted that now 116 Members supported the proposal contained in document WT/DSB/W/609/Rev.14. This growing number attested to the deep concern among Members of this Organization as to the current and prolonged impasse in the AB selection processes. The disagreement regarding the functioning of the Appellate Body did not provide legitimate justification for blocking of the AB selection processes. As other Members had already mentioned at the present meeting, and at prior DSB meetings, vacancies should be filled as they arose in accordance with Article 17.2 of the DSU. This was an obligation of WTO Members, and Members were currently in breach of that obligation. The quest to improve to the functioning of the dispute settlement system should not serve as an obstacle to its operation. The December deadline was rapidly approaching and there was an urgent need to find a solution to this problem. As such, Ecuador acknowledged Amb. Walker's efforts as Facilitator in the informal process on AB matters and was grateful for his progress reports on the informal process. Ecuador reaffirmed its full support of the informal process and its willingness to continue to contribute to the efforts of Members that sought, as a matter of priority, to unblock the AB selection processes.

10.8. The representative of New Zealand said that New Zealand wished to reiterate its support for the co-sponsored proposal, emphasized the systemic importance of urgently commencing the AB selection processes and referred to its statements made at prior DSB meetings on this critical issue.

10.9. The representative of Norway said that Norway was pleased to see that 116 Members had signed as co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.14. A vast number of co-sponsors was to be expected, considering the fact that Members had heard no objection to this proposal other than that of the United States. Norway said that Members could, of

course, continue repeating their old speaking points under this Agenda item. He referred to Norway's statements made at prior DSB meetings on this matter. However, it would be more appropriate if Members had some real conversations and discussions on this matter. For this to happen dependent on one Member only. By reiterating that systemic concerns remained unaddressed did not reflect the actual situation. Therefore, Norway urged the United States to start real conversations, which would be constructive rather than destructive.

10.10. The representative of Indonesia said that his delegation wished to be associated with the statement made by Mexico on behalf of the co-sponsors to the proposal to launch the AB selection processes contained in document WT/DSB/W/609/Rev.14. Indonesia was also a co-sponsor of the proposal. Indonesia welcomed Malaysia and Thailand as the new co-sponsors. The increasing number of Members on board to support the launch of the AB selection processes was a testimony of the urgency of the situation. Indonesia wished to reiterate its serious systemic concern over the continued impasse in the AB selection processes. The circumstance had become more alarming since Members were just 10 weeks away from the end of a fully functioning Appellate Body, if the AB selection processes were not immediately initiated. Hence, Indonesia wished to recall that WTO Members shared a common responsibility to immediately fill the AB vacancies, as required by Article 17.2 of the DSU. In this regard, his delegation, once again, urged all Members, to fulfil their responsibility towards this Organization, by starting the AB selection processes immediately.

10.11. The representative of Switzerland said that her delegation wished to refer to its statements made at previous DSB meetings on this matter. The situation was alarming, and Switzerland deeply regretted that the DSB was still unable to launch the AB selection processes. Switzerland fully supported the informal process under the auspices of the General Council aimed at finding concrete solutions. Once again, Switzerland urged all Members to engage constructively in order to solve this impasse without further delay.

10.12. The representative of Canada said that his country supported the statement made by Mexico, and shared the concerns expressed by many Members. Canada welcomed Malaysia and Thailand that had joined the co-sponsors, raising the number of WTO Members calling for the launch of the AB selection processes to 116. The critical mass of WTO Members behind the proposal contained in document WT/DSB/W/609/Rev.14 was a testimony of the importance that Members collectively accorded to a fully functioning Appellate Body being part of the dispute settlement system. Canada remained committed to working with other interested Members, including the United States, with a view to addressing concerns and undertaking the AB selection processes expeditiously. Canada deeply regretted that the DSB had not complied with its legal obligation under Article 17.2 of the DSU to appoint Appellate Body members to fill the vacancies. The text of the DSU was clear: "[v]acancies shall be filled as they arise". This requirement did not provide for exceptions or justifications not to replenish the Appellate Body.

10.13. The representative of China said that his country supported the statement made by Mexico on behalf of 116 Members which represented more than 70% of the entire Membership. China welcomed Malaysia and Thailand as co-sponsors of this important proposal contained in document WT/DSB/W/609/Rev.14 and wished to encourage more Members to do the same in order to forge greater political support towards breaking the current deadlock. China regretted that the illegal blockage by the United States continued to frustrate the collective efforts of Members to launch the AB selection processes. The existing two-tier dispute settlement system served the entire Membership well. The impartial and prompt resolutions of disputes could contribute to a favourable global trading environment that would benefit everyone. As the main architect of the dispute settlement system, the United States was probably also its biggest beneficiary. If the WTO Appellate Body were to be paralyzed, not only the interests of the entire WTO Membership, but also that of the United States would be compromised. While the Appellate Body was one step closer to a potential paralysis, the demand for its services stayed at a very high level. Thus far, there were 12 pending appeals and Members continued to bring in more disputes which might eventually be appealed. Notably, in 2019 the DSB had already established 10 panels, including the one established at the present meeting. If Members could not break the deadlock in time, the resulting uncertainty would eventually undermine the functioning of the remaining parts of the dispute settlement system. In response to this pressing crisis created by the United States, Members continued to try every means to accommodate the concerns they had raised as long as the essential features of the dispute settlement system were preserved. In particular, China recognized the various efforts of Amb. Walker as Facilitator in trying to move the informal process on AB matters forward, which included the development of a concrete reform using text-based convergence points before the next

General Council meeting. China wished to reiterate its commitment to this process and sincerely hoped these latest efforts could break through the current impasse. Article 17.2 of the DSU was crystal clear that: "[v]acancies shall be filled as they arise". China, therefore, urged the United States to respect its legal obligation under the DSU and to work with other Members constructively with a view to unblocking the AB selection processes expeditiously.

10.14. The representative of India said that his country wished to refer to its statements made at previous DSB meetings on this matter and wished to reiterate its serious concerns regarding the DSB's inability to comply with its legal obligation under Article 17.2 of the DSU to appoint AB members to fill the vacancies. The text of the DSU was clear: AB vacancies had to be filled as they arose. This requirement did not provide for exceptions or justifications not to replenish the Appellate Body. Therefore, India called on all Members to engage constructively to immediately start the AB selection processes as a priority.

10.15. The representative of Hong Kong, China said that his delegation simply wished to reiterate its deep concerns about the impasse in the AB selection processes and urged for constructive discussion among Members to resolve the deadlock without delay.

10.16. The representative of Turkey said that her country also referred to its statements made at previous DSB meetings and expressed its deep concerns with the current stalemate. As one of the 116 co-sponsors of the proposal presented by Mexico, Turkey joined others in stating that Members had to start the AB selection processes without further delay, as required by Article 17.2 of the DSU. It was the responsibility of all Members. In this respect, Turkey welcomed constructive discussions and several proposals presented by Members for breaking the current impasse in the informal process on AB matters under the General Council. Turkey valued those discussions and proposals. Turkey was ready to work constructively with all Members in order to overcome this impasse and invited all parties to engage in discussions with the Membership in this regard.

10.17. The representative of Chinese Taipei said that his delegation wished to refer to its statements made at previous DSB meetings. As many delegations had mentioned, this was an urgent situation. If Members took into account the time needed for the completion of the AB selection processes, they should understand that the deadline to prevent the paralysis of the Appellate Body in December 2019 was not simply getting closer: it was actually already here. Therefore, Chinese Taipei continued to support the proposal contained in document WT/DSB/W/609/Rev.14 and hoped that the impasse could be resolved as soon as possible.

10.18. The representative of Singapore said that his delegation wished to reiterate its serious systemic concerns about the failure to launch the AB selection processes. Singapore welcomed its fellow ASEAN neighbours Malaysia and Thailand who had formally joined as co-sponsors. This brought the total number of co-sponsors to 116. With just two months and 10 days left before D-Day on 10 December 2019, Members unfortunately did not appear to be any closer to a solution to this impasse. Singapore remained committed to supporting Amb. Walker as Facilitator in the informal process on AB matters, and urged all Members, especially those who had raised concerns, to actively engage in finding solutions. Singapore reiterated its consistent view that the AB selection processes should be allowed to proceed unconditionally in the meantime. Singapore would continue to engage constructively and collaboratively towards resolving this impasse.

10.19. The representative of Japan said that his country wished to refer to its statements made at previous DSB meetings. Japan continued to support the informal process on AB matters led by Amb. Walker as Facilitator. The active engagement of all WTO Members was essential.

10.20. The representative of Australia said that her country wished to refer to its previous statements on this matter and reiterated its serious concerns regarding the DSB's inability to commence the AB selection processes. Australia welcomed progress in the General Council informal process on AB matters and viewed the anticipated transition to text-based discussions as a positive step forward. However, Australia remained clear-eyed about the hard work required over the next few months to address key concerns regarding the functioning of the Appellate Body. Australia was strongly committed to the work ahead and encouraged Members to continue solutions-focused, active engagement and to demonstrate the necessary flexibility to agree on pragmatic solutions in the interests of all Members.

10.21. The representative of Korea said that his country welcomed new co-sponsors and supported the statement made by Mexico based on the joint proposal contained in document WT/DSB/W/609/Rev.14. Korea wished to refer to its statements made at previous DSB meetings.

10.22. The representative of Mexico, speaking on behalf of the 116 co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.14, expressed their regret that for the twenty-seventh occasion, Members had still not been able to start the AB selection processes and had continuously failed to fulfill their duty as Members of this Organization. The fact that a Member might have concerns about certain aspects of the functioning of the Appellate Body could not serve as a pretext to impair and disrupt the work of the Appellate Body. There was no legal justification for the current blocking of the AB selection processes, which was causing concrete nullification and impairment for many Members. As Article 17.2 of the DSU clearly stated: "[v]acancies shall be filled as they arise". No discussion should prevent the Appellate Body from continuing to operate fully and Members had to comply with their obligation under the DSU to fill the AB vacancies. By failing to act at the present meeting, Members would maintain the current situation which was seriously affecting the functioning of the Appellate Body against the best interest of all Members.

10.23. The representative of Mexico said that Mexico wished to welcome the countries that had decided to join the list of co-sponsors of the proposal contained in document WT/DSB/W/609/Rev.14, which accordingly comprised 116 Members. Mexico encouraged all other Members to also co-sponsor this proposal. To date, over ten proposals had been submitted as part of an informal process on AB matters conducted under the auspices of the General Council, with the aim of addressing the concerns expressed. This should be reason enough to launch the AB selection processes. However, and more importantly, Members had to de-link the AB selection processes from any other concerns. All Members had a shared responsibility to resolve this pressing issue as soon as possible. Therefore, Mexico wished to reiterate its willingness to work towards finding a solution and urged all Members to immediately initiate, in a responsible manner, the AB selection processes.

10.24. The representative of Chile said that his country wished to make a brief statement with respect to two issues. First, Chile wished to note that, at the present meeting, there was a clear majority, namely, 70.7% of the WTO Membership that was voicing support for launching the AB selection processes. Second, with regard to the concerns raised about the functioning of the Appellate Body, Chile said that Members were grateful for Amb. Walker's work as Facilitator in the informal process on AB matters conducted under the auspices of the General Council since January 2019. This process had helped to hear and share these various concerns. Significant inroads had been made as a result of this informal process. Members had received a progress report on points of convergence. Chile wished to join the 70.7% of the Membership and believed that the points of convergence were very important at this sensitive and delicate stage in the history of this Organization.

10.25. The representative of Malaysia said that his delegation wished to thank Mexico and other Members for co-sponsoring the proposal contained in document WT/DSB/W/609/Rev.14. Malaysia wished to urge and ring the alarm in relation to the current impasse in the AB selection processes. While Malaysia acknowledged specifically the concerns expressed by the United States on this issue, the loss of an effective dispute settlement system should be avoided at all costs. Hence, Malaysia strongly supported that AB vacancies be filled expeditiously, as not doing so might jeopardize the viability of the entire WTO dispute settlement system. It was Malaysia's hope that the Appellate Body could continue to be a multilateral enforcement mechanism. While Malaysia was not an active user of the dispute settlement mechanism, Malaysia viewed that it was the collective responsibility of all Members to identify potential solutions to address the issue pertaining to the AB selection processes. It was critical that Members exercised flexibility to resolve the pending issues to ensure that the credibility of the multilateral trading system was not undermined. The only solution to the current situation was constructive dialogue and real engagement from all WTO Members to address the impasse. Resolving the impasse in the Appellate Body was most urgent. All WTO Members should work together to continue to emphasize the importance of the system and urge the United States to come to the negotiating table to resolve this issue.

10.26. The representative of the United States said that the United States had listened closely as several Members had criticized the United States. These Members argued that the United States had failed to participate in ongoing discussions on Appellate Body reform. As explained at past meetings of the DSB, these statements were wrong. The facts established that no Member had been more constructively and consistently engaged on these substantive issues than the United States. The

United States continued, as it had always done, to be engaged on these important substantive issues, including by meeting regularly with Amb. Walker as Facilitator in the informal process and with Members to exchange views on the issues under discussion. Indeed, for several months, both within the informal process and outside, the United States had actively sought engagement from Members on what the United States believed to be a fundamental issue. The United States questioned how Members had come to this point where the Appellate Body, a body established by Members to serve the Members, was disregarding the clear rules that had been set by those same Members. In other words, Members needed to engage in a deeper discussion of why the Appellate Body had felt free to depart from what Members had agreed to. Engagement was a two-way street. Without further engagement from WTO Members on the cause of the problem, there was no reason to believe that simply adopting new or additional language, in whatever form, would be effective in addressing the concerns that the United States and other Members had raised.

10.27. The representative of the European Union said that the United States had raised, once again, the question of "what has allowed the Appellate Body to disregard the rules in the DSU". On this question, the EU wished to reiterate that Members should be having a forward-looking discussion and should not continuously re-litigate their differences as to the reading of the current rules. And the EU was looking forward to continuing such forward-looking discussion in the General Council informal process on AB matters. On substance, it was no secret that the EU disagreed with the United States but in order to save time, the EU would refer to its statements made at previous DSB meetings on these issues. The EU's views were well known, but the EU would be happy to explain its position again as appropriate.

10.28. The Chairman thanked all delegations for their statements. He said that as in the past, the DSB would take note of the statements expressing the respective positions, which would be reflected in the minutes of the present meeting. As delegations had noted at the present meeting, this matter required urgent engagement on the part of all WTO Members. As Members were aware, under the auspices of the General Council, he had agreed to assist the Chair of the General Council, as Facilitator, in an informal process of focused discussions on Appellate Body matters. He recalled that on 23 July 2019, he had provided a third progress report to the General Council on his informal consultations. This report had been circulated to all Members in document JOB/GC/220. He said that he would continue to consult on these matters in various configurations and would report again to the Membership on the results of his consultations at the next General Council meeting scheduled for 15 October 2019.

10.29. The DSB took note of the statements.

11 CANADA-EUROPEAN UNION INTERIM APPEAL ARBITRATION ARRANGEMENT PURSUANT TO ARTICLE 25 OF THE DSU (JOB/DSB/1/ADD.11)

A. JOINT PRESENTATION BY CANADA AND THE EUROPEAN UNION

11.1. The Chairman said that this matter was on the Agenda of the present meeting at the joint request of Canada and the European Union. He drew attention to the communication contained in document JOB/DSB/1/Add.11. He then invited the representatives of the respective delegations to speak.

11.2. The representatives of Canada said that, on 25 July 2019, Canada and the EU had notified this interim arrangement pursuant to the Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes (JOB/DSB/1/). Canada recalled that, under this Mechanism, Members were invited to circulate, *inter alia*, documents that indicated their intention to follow, either unilaterally or on a reciprocal basis with other Members, certain practices and procedures in their future disputes (as set out in paragraph 6). Members were also invited, if they so wished, to introduce such documents for discussion during a DSB meeting (as set out in paragraph 8). In the notification filed by Canada and the EU on 25 July 2019, Canada and the EU indicated their intention to resort to arbitration under Article 25 of the DSU as an interim appeal arbitration procedure in future disputes between Canada and the European Union. The interim nature of this arrangement meant that the appeal arbitration procedure would apply only if, and only as long as, the Appellate Body was not able to hear appeals of panel reports due to an insufficient number of its members. Indeed, the interim arrangement had to be seen as a contingency measure prompted by the impasse related to Appellate Body appointments. As a

contingency measure, this was not an endorsement or a critique of the status quo. There were more appropriate vehicles and venues for advancing proposals for reform. As all Members were acutely aware, for the past two years, every month the Agenda of the DSB had featured proposals to launch AB selection processes. Even though a large number of WTO Members had endorsed these proposals, there was still no consensus in the DSB on this matter. As a result, the Appellate Body as of now had only three members. Unless appointments were made in time, there would soon be only one member left and the Appellate Body would not be able to hear new appeals. This would in turn undermine the entire WTO dispute settlement process. It remained Canada's and the EU's clear priority to resolve the Appellate Body impasse. Canada and the EU had made formal proposals to that end, were actively engaged in, and would continue to support, the process led by Amb. Walker as Facilitator that was aimed at addressing the concerns raised by the US delegation and at the unblocking of the Appellate Body appointments. In the meantime, however, due diligence commanded that Canada and the EU prepare arrangements to safeguard their procedural rights in WTO disputes in the event where the appointments remained blocked despite Members' best efforts.

11.3. The representative of the European Union said that, as December 2019 was approaching, WTO Members who had pending disputes or who may have disputes in the future were faced with the question of how to manage these disputes if the Appellate Body became non-operational. Canada and the EU were committed to a multilateral rules-based trading system, as embodied in the WTO. Within that system, WTO Members were entitled to a third party, binding adjudication of trade disputes and to an independent and impartial appellate review of panel reports. Canada and the EU did not wish to see these rights compromised should the Appellate Body impasse continue. Therefore, with this interim arrangement, Canada and the EU wished to preserve their right to appellate review provided under Article 17 of the DSU by replicating it as closely as possible within the framework of Article 25 of the DSU. First, the task of the appeal arbitrator would be to review legal issues covered in the panel report, thereby preserving a two-step system. Second, the procedure would very closely resemble the procedure before the Appellate Body, including as regards the rights of third parties. Third, the appeal arbitrators would be former AB members, selected randomly by the WTO Director General from the pool of available former AB members. Since these persons had been appointed in the past by the WTO Membership and had effectively served as AB members, this would contribute to the legitimacy and quality of this mechanism. Canada and the EU also envisaged that they would receive appropriate administrative and legal support from the AB Secretariat, just like AB members. Fourth, under Article 25 of the DSU, the arbitration award would be binding on the parties and enforceable through the DSU's compliance and sanctions procedures. Therefore, for all practical purposes, it would have the same legal effects between the parties as AB reports.

11.4. The EU further stated that with this interim arrangement, Canada and the EU also wished to preserve the panel proceedings as much as possible. Only at the very end of the panel proceedings – when the final panel report was issued to the parties but not yet circulated to the broader WTO Membership – could a party trigger the appeal arbitration procedure by suspending the panel proceedings. If neither party appealed under the appeal arbitration procedure, the panel report would be normally circulated and adopted by the DSB. This interim arrangement was of a bilateral nature. This meant that it would only be applicable in disputes between Canada and the EU, should such disputes arise in the future. However, by circulating this arrangement and presenting it at the present DSB meeting, Canada and the EU had wished to make it transparent to the entire Membership. Other Members might also be reflecting on possible contingency measures, as Canada and the EU had. Canada and the EU believed that this arrangement constituted a workable solution and provided a model for other Members who wished to preserve, on an interim basis, a binding, independent and two-stage dispute settlement process, as envisaged by the WTO Agreements. The EU noted that the arrangement anticipated procedures for situations in which multiple WTO Members had appeal-arbitration arrangements in place between them and had used those arrangements to initiate appeal-arbitrations related to the same matter. Finally, Canada and the EU wished to recall that, where applicable, other practice documents circulated pursuant to the Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes (JOB/DSB/1), and which were endorsed by Canada and the EU, would also apply to the interim appeal arbitration procedure between them. This was the case, in particular, of the practice document on Transparency of Dispute Proceedings (JOB/DSB/1/Add.3), pursuant to which Canada and the EU would request the arbitrator to provide for a series of transparency measures, such as open hearings. Canada and the EU looked forward to comments and questions from Members regarding the interim appeal-arbitration arrangement at the present meeting.

11.5. The representative of the United States said that the United States would first note that Members had the right to use Article 25 of the DSU on arbitration to resolve their disputes. And indeed, the United States was one of the parties to the only instance to date in which Article 25 arbitration had been used. However, the proposal presented at the present meeting raised a number of systemic and practical concerns. The proposal explicitly stated that the intent was "to replicate as closely as possible all substantive and procedural aspects as well as the practice of Appellate Review pursuant to Article 17 of the DSU". In other words, Canada and the EU did not see any problem with the Appellate Body practice at all. This proposal demonstrated that, despite the fact that the Appellate Body through its practice had repeatedly breached the rules set by WTO Members, Canada and the EU appeared to endorse and legitimize those breaches. This was confirmed, for example, by the fact that the proposal said that any arbitration award should be treated like an Appellate Body report "for purposes of interpretation". Despite all of the discussion in the General Council and the DSB that the DSU had no system of precedent, Canada and the EU's approach to "interpretation" demonstrated that these Members wanted binding precedent and would seek to require arbitrators to act inconsistently with the WTO Agreement. Apparently, more than one year of discussion of Members' agreed WTO rules on dispute settlement had brought them no closer to a shared understanding of what the plain words meant. This raised the grave concern that, not only did the Appellate Body not respect the rules as written, but those WTO Members did not want the rules to be respected as written. The United States questioned how this attitude could be consistent with a rules-based trading system. The proposal contained a number of legal flaws and elements that might not be workable, such as publication of a panel report that was not a panel report. Further, there was no basis for the Secretariat assigned to the Appellate Body to work instead on arbitrations as if these proceedings constituted the activity of a parallel Appellate Body. The United States continued to consider that the way forward was to understand and recognize the concerns that had been raised with the Appellate Body and engage in a deeper discussion of why the Appellate Body had felt free to depart from what Members had agreed to, so that appropriate solutions could be found.

11.6. The representative of Argentina said that his country wished to thank the European Union and Canada for their presentations concerning the Interim Appeal Arbitration Arrangement pursuant to Article 25 of the DSU. Their statements at the present meeting allowed Members to bring a multilateral approach to the discussion of one of the options formulated by some Members to resolve the current deadlock in the WTO dispute settlement system. Argentina had historically been an active participant in the WTO dispute settlement system. Therefore, its possible paralysis was a matter of concern. Argentina believed that the absence of an effective system for the resolution of disputes would negatively affect one of the essential pillars of this Organization. The mechanism presented by Canada and the EU at the present meeting was a genuine effort to move forward in a positive manner, despite being imperfect from a systemic point of view and incomplete in terms of its coverage of Members. Argentina's priority remained focused on reaching multilateral solutions. Argentina would, therefore, continue to participate actively in Amb. Walker's efforts to find solutions as part of the informal process on AB matters. On this basis, Argentina would follow with interest any progress that might result from the identification of potential points of convergence to address the concerns that had been expressed on the operation of the system, and to move ahead with launching the AB selection processes. Argentina was convinced that the Membership should continue to assist the Facilitator in his task with a view to reaching basic points of consensus. Argentina, once again, wished to thank the EU and Canada for their positive efforts that went into this initiative, and took this opportunity to ask whether these Members intended to somehow multilateralize or encourage others to join the Interim Appeal Arbitration Arrangement proposal. Argentina also wished to know what would be the most suitable way of doing this.

11.7. The representative of Japan said that his country thanked the EU and Canada for their statements made at the present meeting under this Agenda item. Japan took note of the points made by the EU and Canada. In particular, the EU and Canada had explained that this arrangement was intended to be interim in nature. Japan also noted that this was a bilateral arrangement between two Members and was not intended to create a new mechanism of a plurilateral nature within the system. Indeed, the informal process led by Amb. Walker as Facilitator was currently at a critical juncture. While recognizing the need to prepare a contingency plan, Members' primary goal had to remain that of finding a satisfactory solution to the Appellate Body matter so as to restore and maintain the proper and sustainable functioning of the WTO dispute settlement system. Time was running out and because of that, Members had to focus on addressing the immediate issues before them. As for the interim arrangement that the EU and Canada had presented at the present meeting, Japan was carefully examining the document the EU and Canada had circulated. In any event, Japan

understood the idea was to preserve a two-tier system in the event the Appellate Body ceased to operate. Japan recognized that the Appellate Body was an integral part of the existing dispute settlement mechanism and that a dysfunctional Appellate Body could bring the entire system to a halt. However, replacing the Appellate Body with another two-tier mechanism of some kind was not the only way to keep the system running at this time of exigency. Japan stood ready to discuss any option to this end with any interested Member. That said, Members should not lose sight of the fact that their focus and emphasis had to remain firmly set on finding a long-lasting solution to the Appellate Body matters. With this, Japan once again fully supported the work of Ambassador Walker as Facilitator in the informal process on AB matters.

11.8. The representative of Colombia said that his country wished to thank Canada and the European Union for presenting a joint proposal on an interim appeal arbitration arrangement pursuant to Article 25 of the DSU. Columbia welcomed this proposal and understood that this was a provisional and bilateral solution to a potential deadlock of the Appellate Body's regular activities. Colombia was convinced of the importance of maintaining an appellate review mechanism for WTO dispute settlement system and acknowledged the commitment undertaken to present an alternative based upon and respectful of the DSU. While recognizing the importance of finding an interim solution in the event of a potential stalemate, Colombia believed that the Membership should keep channelling its efforts through the informal process on AB matters conducted under the auspices of the General Council to avoid such a stalemate, and that it should keep aiming at finding a suitable and long-lasting solution to the Appellate Body impasse.

11.9. The representative of Norway said that this Agenda item was of course related to the previous Agenda item. Members should remember that – despite vague references to a different, undefined, deeper discussion – there should be an easy solution to the underlying problem: the end of the blockage of new AB appointments. Thus, Norway repeated that Members needed to work together with full force to untie that knot, and that Norway really appreciated the work undertaken by Amb. Walker as Facilitator of the informal process on this matter. That being said, Norway also highly appreciated constructive efforts from Members to handle the situation and safeguard a well-functioning dispute settlement system. Norway was currently assessing the details contained in this "agreement template" and whether or not it should also enter into similar agreements.

11.10. The representative of Australia said that her country wished to thank Canada and the EU for their statements made at the present meeting under this Agenda item. Australia recognized that Members would need to consider interim options in the event the Appellate Body ceased to hear new disputes. However, like other Members, Australia urged Members to continue supporting the General Council informal process on AB matters as their foremost priority at this time.

11.11. The representative of Canada wished to thank Members for these comments and questions. In response to those comments and questions, Canada wished to make the following observations. The interim arrangement was intended to preserve the rights, to the extent possible, between Canada and the EU, on the basis of the existing DSU provision, namely, Article 25. Canada hoped to see the positive outcome of the ongoing informal process on AB matters led by Amb. Walker and Members would continue engaging constructively in that process. But, in the meantime, it was Members' right to take contingency measures. Canada and the EU were transparent about the arrangement and had also made certain that other WTO Members could participate as third parties in appeal arbitration, on the same conditions as those applicable to appellate proceedings. As Canada and the EU had explained, what was sought with this interim arrangement was to preserve Canada's and the EU's WTO rights, pending the resolution of the AB impasse. A bilateral arrangement was an appropriate vehicle for that purpose as between Canada and the EU. At this point, Canada and the EU saw this indeed as a flexible arrangement that could be deployed between any two WTO Members. But Canada and the EU were open to hear the views of other Members on this matter. Indeed, the interim arrangement had to be seen as a contingency measure prompted by the impasse related to AB appointments. As a contingency measure, this was not an endorsement or a critique of the status quo. There were more appropriate vehicles and venues for advancing proposals for reform, including the one led by Amb. Walker as Facilitator in the informal process on AB matters.

11.12. The representative of the European Union said that his delegation wished to conclude by thanking delegations for their comments and questions. This discussion confirmed that many WTO Members were struggling with the question of how to manage their disputes in case they were affected by the impasse related to AB appointments. Canada and the EU took particular note of the statement made by Australia. The rationale behind the interim arrangement was straightforward:

this was a contingency measure that would allow Canada and the EU to preserve their WTO rights in potential disputes between them in the context of the AB impasse. This included, in particular, the right to have their trade disputes resolved through binding adjudication and the right to an appeal. Canada and the EU had devised a workable solution that would preserve these rights on an interim basis. But, both delegations wished to strongly emphasize that they did not pretend that this arrangement could replace a fully functioning dispute settlement system, which included a standing Appellate Body. This was why the work towards unblocking the AB selection processes would remain their clear priority. If delegations were interested in more details regarding this arrangement, they could contact the EU bilaterally and the EU would be happy to discuss it with them.

11.13. The DSB took note of the statements.